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Peter McCabe, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
Thurgood Marshall Federal Judicial Building
Washington, D.C. 20544

Re: Proposed Federal Rules Changes for e-Discovery

Dear Secretary McCabe:

I am writing to express my concerns about the proposed changes to the federal rules for e-discovery. I am an associate in the Law Offices of Peter G. Angelos. We are a plaintiffs' law firm that serves individuals primarily in tort actions. I work in the pharmaceutical practice group and focus on toxic tort matters. Currently, I represent over 130 families in Maryland whose properties have been contaminated by toxic chemicals. I offer my comments as an individual attorney and as a citizen of this great Nation.

While I appreciate the need to address electronic documents specifically, these changes far exceed the bounds set by our federal system of government; tip the balance in favor of defendants; and effectively may encourage more discovery disputes. As you well know, notice pleading was adopted decades ago for the purpose of giving greater access to the civil justice system to individuals. Prior to that time, fact pleading was the norm, and it gave an enormous advantage to big business. Since the adoption of notice pleading, the defense bar and the large corporations they represent have worked steadily to undermine notice pleading by attacking the discovery rules. I fear the proposed changes to Rule 26 and Rule 37 will go far to achieve these goals and do not address any legitimate problems. I urge you to not adopt these proposed changes.

Before I explain my position on proposed changes to Rules 26 and 37, I would like to commend the Committee on Rules of Practice and Procedure for the proposed changes to Rules 16, 26 and 34. These changes are a meaningful response to a legitimate problem: the waste of judicial and litigant resources in determining the existence of electronic information. I support the adoption of these changes, but I cannot support the adoption of proposed Rule 26(b)(2), 26(b)(5), or 37.

Proposed Rule 26(b)(2), providing that "[a] party need not provide discovery of electronically stored information that the party identifies as not reasonably accessible," is anti-intuitive to the very concept of electronic data. The reason why business has moved in the

direction of electronic documentation is not only because electronic information is less expensive to store, but also it is easy to access and retrieve. I recently worked on an automobile products-liability case where the defendant produced thousands of customer assistance inquiry requests ("CAIRs") in electronic format. I was able to do a search on these records and in a matter of a few hours narrow the field to the records relevant to our case. If these records were kept merely on paper, the defendants might have had good reason to resist the discovery request for CAIRs. They would have had to sift through the paper records themselves or would have forced us to arrive at some remote warehouse to shuffle through dusty boxes of records. Adopting this rule would give defendants another tool to refuse production of relevant documents. They could simply call the CAIRs "not reasonably accessible" and then refuse to produce them. We, in turn, would have to file a motion to compel. In short, allowing defendants the ability to label electronic data as "not reasonably accessible" as suits their needs is an endorsement of stonewalling and an invitation to more, not less, discovery motions practice.

Proposed Rule 26(b)(5), which allows to parties to claim privilege even after documents have been produced, goes even further to slant the discovery field in favor of defendants. First, it relieves defendants from the duty of examining documents for privilege before releasing them. Second, it creates a substantive right for defendants. This raises substantial Constitutional issues, not only because creating substantive rights for parties is well outside the Committee's power, but also because it preempts state law in the area of privileged documents and state ethics rules for the regulation of attorneys. For example, Maryland courts follow the intermediate test for inadvertent disclosure of privileged documents. *See Elkton Care Center Assoc. v. Quality Care Mgt. Inc.*, 805 A.2d 1177, 1183-85 (Md. App. 2002). This approach calls for the application of several factors in considering whether privilege has been waived by the inadvertent disclosure. Proposed Rule 26(b)(5), however, requires federal courts to take the approach that privilege is never waived by inadvertent disclosure. Therefore, in a diversity case based on Maryland state law claims, federal rules would pre-empt Maryland's substantive law. If proposed Rule 26(b)(5) is adopted, I guarantee there will be litigation over its validity. This will hardly reduce the workload of the courts.

Proposed Rule 37 has equally disastrous implications. It basically deprives courts of the ability to prevent the destruction of discoverable documents, while encouraging businesses to set routine data purges to short intervals. It also works against the very reason businesses have shifted to electronic forms of documentation: inexpensive storage of more records for greater lengths of time. This is bad policy from both a legal and business management perspective. Moreover, such policy decisions should be made by the people's representatives in Congress, not by the unelected judiciary.

I may be an attorney, but I am not rich by any standard. The defense bar knows that many plaintiffs' attorneys are sole practitioners and small firms that simply do not have the financial resources to fight endless discovery disputes. These proposed changes to Rules 26 and 37 are aimed at bankrupting plaintiffs' attorneys, not at reducing discovery motions practice or easing the burden of the courts.

I respectfully request that you decline to adopt proposed Rules 26(b)(2), 26(b)(5), and 37. Please do not give into pressure by corporate America. We are still a government of the people, by the people and for the people, not a government of, by and for the corporations. Thank you for the opportunity to comment on these important rules changes.

Yours Truly,

Karyn S. Bergmann, Esq.

Enclosure
KSB/kb

Spoke to Ms. Bergmann. She said there was no enclosure. JK 3/16/05